

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27627-9-III

Respondent,

Division Three

v.

MILES BARTON NICHOLS,

Appellant.

UNPUBLISHED OPINION

Sweeney, J. — A defendant's objection to a continuance is waived if he or someone on his behalf moves for the continuance. CrR 3.3(f)(2). Here, the defendant's attorney and the trial judge moved on the defendant's behalf for three continuances. His objection to two of those continuances is waived. The defendant's trial, then, was held within the requisite speedy trial period. And we conclude that an affidavit for a search warrant supported the trial court's conclusion that there was probable cause to issue a warrant to search a particular home for the defendant and items he was suspected of stealing. We affirm the defendant's convictions.

FACTS

Benton County Detective John Hansens applied for a warrant to search a residence located at 2807 Van Dyke Court in Richland for a chain saw and construction material Miles Nichols stole from Lumberman's Store. The trial court determined that Detective Hansens's affidavit supported a finding of probable cause and issued a warrant to search the Van Dyke property and seize Mr. Nichols, the chainsaw, certain construction material, and all paperwork relating to the purchase of construction material from Lumberman's.

Officers searched the house and found Mr. Nichols, guns, "three separate marijuana grow operations containing growing Marijuana plants, lights, soil and [a] watering apparatus[,] controlled substances . . . including a substance in the master bedroom [which] tested presumptively for the presence of methamphetamine[, and Mr. Nichols's] personal belongings." Clerk's Papers (CP) at 65; *accord* Appellant's Br., Appendix C.

The State arrested Mr. Nichols and charged him, in relevant part, with manufacturing marijuana and possessing methamphetamine. He was arraigned on May 14, 2008, and held in jail on \$15,000 bail.

Mr. Nichols waived his right to a speedy trial in writing until July 14, 2008. The parties then agreed to continue the trial to July 28 and again to July 30 so they could pick

a jury.

On July 30, Mr. Nichols moved to suppress the drug evidence on the ground that the facts in the affidavit supporting the warrant did not establish probable cause. The court had to reset the trial to August 25 so it could decide Mr. Nichols's motion and so Mr. Nichols's attorney could investigate a separate issue raised by Mr. Nichols. Mr. Nichols orally waived his speedy trial right until August 25.

On August 13, the court learned that Mr. Nichols's original attorney had taken a new job in a different county. Mr. Nichols then asserted that his speedy trial time had passed. The trial court determined that the lack of a witness and defense counsel was good cause to continue the suppression hearing and the trial. It reset the trial from August 25 to September 2, appointed new defense counsel, and told Mr. Nichols that it would not conclude that he waived his speedy trial right.

The trial court then continued Mr. Nichols's suppression hearing and trial two more times at the request of Mr. Nichols's new defense counsel. The first continuance moved the trial to September 8. Mr. Nichols objected to the second continuance. The trial court noted his oral objection but, nonetheless, continued the suppression hearing to September 17 and the trial to September 29.

A witness for the State did not appear at the September 17 suppression hearing, so,

over Mr. Nichols's objection, the court granted the State a continuance, which moved the hearing one week to September 24 and the trial two weeks to October 13. The parties finally argued the suppression motion on September 24 based on only the search warrant affidavit. The court denied Mr. Nichols's suppression motion after concluding that the informant met the *Aguilar-Spinelli*¹ requirements and that probable cause supported the warrant to search the Van Dyke property.

The court then found good cause—the prosecutor's unavailability—to continue the trial to October 20. And Mr. Nichols agreed to continue his trial one more week—to October 27—for a stipulated facts bench trial. A stipulated facts bench trial proceeded on October 27, and the court found Mr. Nichols guilty of manufacturing marijuana and possessing methamphetamine.

DISCUSSION

Speedy Trial

Mr. Nichols contends that the October 27 trial date violated his right to speedy trial. He argues that his speedy trial period ran on September 12. Our review is de novo. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

A defendant who is incarcerated must be tried within 60 days of his arraignment

¹ *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

date. CrR 3.3(b)(1)(i). That 60-day period will be reset if the defendant files a signed, written waiver of his speedy trial right. CrR 3.3(c)(2)(i). The new 60-day period begins on the date specified in the waiver. CrR 3.3(c)(2)(i).

Here, Mr. Nichols waived his speedy trial right in writing until July 14. The new 60-day period, then, began on July 14 and would end on September 12 but only if we disregard several continuances. We must, however, account for continuances. CrR 3.3(e)(3).

Continuances are excluded periods when computing the time for speedy trial. CrR 3.3(e)(3). They effectively extend the speedy trial period by the length of the delay. A continuance may be granted on motion of the court or either party. CrR 3.3(f)(2). A party who objects to a continued trial date on speedy trial grounds must move for and note a hearing on the issue or lose the right to object. CrR 3.3(d)(3). A motion to continue by Mr. Nichols or on his behalf waives any objection he might have to the continuance. CrR 3.3(f)(2).

The trial court here moved on Mr. Nichols's behalf on August 13 to continue the trial 8 days because it appointed a new attorney to represent him. That continuance extended his speedy trial period from September 12 to September 20. Mr. Nichols's defense counsel then obtained a 6-day continuance on August 20, which extended the

speedy trial period from September 20 to September 26. Counsel also got a 21-day continuance on August 27. That continuance extended the speedy trial period from September 26 to October 17. Mr. Nichols's objections to two of these three continuances may have been waived because the motions to continue were made on his behalf. CrR 3.3(f)(2). But they were for a good cause, in any event. *Id.* Finally, the court granted the State a 14-day continuance for good cause on September 17 because of a missing witness. The continuance extended Mr. Nichols's speedy trial period from October 17 to October 31, four days beyond his actual trial date. Mr. Nichols lost his right to object to this continuance because he neither moved for nor noted a hearing on the issue. CrR 3.3(d)(3). Mr. Nichols's October 27 trial date, then, did not violate his right to a speedy trial.

Moreover, we are not persuaded that Mr. Nichols's case should have been dismissed under CrR 8.3(b). That rule allows a trial court to dismiss a prosecution for an arbitrary action or governmental misconduct that prejudices the defendant and materially affects his right to a fair trial. CrR 8.3(b). Mr. Nichols asserts that the trial court should have required his original defense counsel to represent him. He says the court mismanaged his case by appointing new counsel and forcing him to choose between his right to a speedy trial and adequately prepared counsel. *State v. Teems*, 89 Wn. App.

385, 390, 948 P.2d 1336 (1997) (affirming CrR 8.3(b) dismissal for prosecutorial mismanagement that caused defendant to choose between speedy trial and adequately prepared counsel). The record here, however, shows that Mr. Nichols did not waive his right to speedy trial so the court could appoint new counsel. Instead, the trial court found that the appointment was good cause to continue the trial. That finding is accommodated by the rule. CrR 3.3(f)(2). The court did not, then, mismanage Mr. Nichols's case. Nor did it err by failing to dismiss the case against Mr. Nichols. Mr. Nichols failed to show arbitrary action or governmental misconduct. *Teems*, 89 Wn. App. at 388.

Suppression Motion

Mr. Nichols next contends that Detective Hansens's affidavit did not set forth sufficient facts that the chain saw and building materials he took from Lumberman's would be found at the Van Dyke property. We review de novo the trial court's legal conclusion on a suppression motion that probable cause supported the issuance of a warrant. *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007). Our review is "limited to the four corners of the affidavit supporting probable cause." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

We evaluate the affidavit in a commonsense manner. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). That is, we look for more than mere suspicions and

personal beliefs of criminal activity; we look for facts and reasonable inferences from the facts that support a determination that probable cause exists. *Id.* at 264-65. “Probable cause exists where the affidavit . . . sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.” *Id.* at 264. Probable cause, then, requires a nexus between criminal activity and the items to be seized and between the items to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). We resolve any doubts in favor of the warrant. *Jackson*, 150 Wn.2d at 265.

Detective Hansens’s affidavit shows that, according to Lumberman’s employees and an informant named Val Seabury, a man matching Mr. Nichols’s description charged \$584 in building materials to a construction company’s Lumberman’s account without permission. And he took a Stihl chain saw without renting or paying for it. According to a second informant named Phil Baird, Mr. Nichols sold him a generator at the Van Dyke property two weeks earlier. He told Mr. Baird he could get anything he needed, including tools, machinery, and even a Bobcat. Detective Hansens then visited the property and saw Mr. Nichols’s car in the driveway and a construction tool belt, a plastic tub full of power cords, hard hats, and other construction tools on the front porch. He

also saw two sheds on the property. One shed was open and contained several mowers and yard tools. The other shed was locked.

Based on these facts, the court reasonably inferred that Mr. Nichols steals construction materials, machinery, and tools, takes them to the Van Dyke property, and sells them. It is, therefore, reasonable to believe that the stolen chain saw and construction materials could be found at the Van Dyke property.

The affidavit also establishes the basis of the informants' knowledge and credibility. Where informant tips form the basis of probable cause, an affidavit must set forth facts satisfying the *Aguilar-Spinelli* test: that an informant truthfully relates facts about which he or she has personal knowledge. *State v. Mejia*, 111 Wn.2d 892, 896-97, 766 P.2d 454 (1989). Here, each informant personally witnessed the information they passed on to Detective Hansens. The informants, then, had "knowledge" of the facts they shared. *State v. Duncan*, 81 Wn. App. 70, 76, 912 P.2d 1090 (1996). And the informants gave their identities, which makes them more credible. *State v. Estorga*, 60 Wn. App. 298, 304, 803 P.2d 813 (1991). Moreover, Mr. Baird related facts that were against his penal interests in a postarrest situation and risked disfavor with the prosecutor if he lied. *Id.* The affidavit, then, also establishes that each informant, including Mr. Baird, was credible.

No. 27627-9-III
State v. Nichols

The trial judge properly denied his motion to suppress the evidence seized by the search warrant.

We affirm Mr. Nichols's convictions.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Sweeney, J.

Brown, A.C.J.

Korsmo, J.